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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-382

FEDERAL ENERGY ADMINISTRATION, ET AL., *Petitioners*

v.

ALGONQUIN SNG, INC., ET AL.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE and BRIEF OF AMICUS CURIAE SUBMITTED BY McCLURE & TROTTER IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The law firm of McClure & Trotter hereby moves for leave to file the attached brief *amicus curiae* in support of Respondents pursuant to Rule 42(3) of the Rules of the Supreme Court. Respondents have consented to the filing of this brief and copies of such consents have been submitted to the Clerk of this Court. Petitioners have withheld their consent.

The firm represents several importers of crude oil and petroleum products which have a direct and substantial interest in the outcome of this case.

The brief *amicus curiae* complements Respondents' brief and will, we believe, be helpful to the Court in its consideration of this matter. In support of the argument that the import license fees in controversy violate the uniformity requirement of Article I, Section 8, Clause 1 of the Constitution, the brief *amicus curiae* explains in detail—not found in Respondents' brief—why the fees are not geographically uniform. In addition our analysis of the issue concerning the Constitutionally permissible scope of delegations of legislative powers differs considerably from that presented by Respondents. Finally, our approach to the interpretation of the statute (19 USC 1862(b)) presents pertinent legislative materials not included in Respondents' brief.

WHEREFORE, the law firm of McClure & Trotter requests that this Court grant leave to file the accompanying brief *amicus curiae* in support of the Respondents.

Respectfully submitted,

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March 17, 1976

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BRIEF OF AMICUS CURIAE SUBMITTED BY McCLURE & TROTTER IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The law firm of McClure & Trotter submits this Brief as an *amicus curiae* in support of Respondents. The firm represents several importers of crude oil and

petroleum products which have a direct and substantial interest in the outcome of this case. Because of its practice in the field of customs duties and foreign trade law, the firm recognizes the importance of this case and believes that its views in this matter might be helpful to the Court.

The submission of this brief is made under Rule 42(3) of the Rules of the Supreme Court of the United States.

I

SUMMARY OF ARGUMENT

Disputed Import License Fees Were Imposed Without Statutory Authority.

Section 232(b) of the Trade Expansion Act of 1962 contains no express delegation of power to the President to impose a duty, fee, or other exaction on imports. The statute contemplates action to ensure that the volume of imports of a particular article do not exceed a level determined by the President to be safe from the standpoint of national security. Because only direct or quantitative controls are capable of restricting the volume of imports to an exact pre-determined level, there is no palpable basis to find an implied delegation of power to impose duties or fees. The tenor of the legislative history is that Congress intended to authorize the use of quantitative controls only. Absent clear statutory language authorizing the imposition of duties, fees and similar exactions, and absent legislative history compelling an inference that Congress intended to confer such authority, it should be concluded, as the court of appeals did, that the President was without authority to impose the import license fees in controversy.

II

If Section 232(b) Empowers the President To Formulate and Prescribe Action, It Should Be Declared Invalid as an Unconstitutional Delegation of Legislative Powers.

The power to lay and collect duties and imports and to regulate foreign commerce is vested in the Congress by Article I, Section 8, Clauses 1 and 3 of the Constitution. Portions of such power may be delegated to the Executive Branch when dictated by considerations of practical necessity, but only under such clear and detailed guidelines, conditions, and limitations as the nature of the subject matter will allow. There is nothing inherent in the subject matter of section 232(b) which would preclude the delineation of actions authorized (including the imposition of duties or fees) to accomplish the statutory purpose. In effect Petitioners' construction of section 232(b) is that Congress has conferred on the President the power to prescribe the action to be taken—a fundamental legislative function under the Constitution that cannot be abdicated consistent with the separation of powers doctrine.

III

The Import License Fee System Violates the Constitutional Requirement That All Duties, Imposts, and Excises Be Uniform Throughout the United States.

The import license fee in controversy is not geographically uniform. Oil imported at a West Coast port of entry is charged with a different fee than oil imported at an East Coast or Gulf Coast port of entry under identical circumstances. Since the import fees in question constitute duties, imposts, or excises within the meaning of Article I, Section 8, Clause 1, they are invalid because they fail to meet the requirement of that Clause that such charges be applied uniformly throughout the United States.

ARGUMENT

I

SECTION 232(b) DOES NOT AUTHORIZE THE PRESIDENT TO IMPOSE DUTIES, FEES OR SIMILAR CHARGES ON IMPORTS.

The imposition of the disputed import license fees was based on the claimed authority of section 232(b) of the Trade Expansion Act of 1962, as amended. That provision authorizes the President to take "such action, and for such time, as he deems necessary to adjust the imports" of an article for the purpose of correcting a threatened impairment of the national security resulting from the quantity or circumstances in which the article is being imported. Section 232(b) does not contain express terms authorizing the imposition of any duty, fee, or other exaction with respect to the importation of articles. If such authority exists, it must be inferred from the words actually used, the legislative history and other evidence of Congressional intent.

A. THE STATUTORY LANGUAGE AUTHORIZES ONLY SUCH ACTIONS AS WILL DIRECTLY AFFECT THE QUANTITY OF IMPORTS AND MAKES NO REFERENCE TO ANY KIND OF MONETARY EXACTION.

Petitioners argue that the scope of Presidential powers as to the forms of import-related action permitted by section 232(b) is virtually unlimited and includes action to impose a duty or import license fee. They urge, in essence, that this all-encompassing authority is implicit in the statutory phrase, "such action . . . as he deems necessary". We submit that such an interpretation is erroneous, because, *inter alia*, it fails to give proper weight to other language in section 232 (b) which serves to qualify and limit the kinds of import-related action authorized. Section 232(b), read in its entirety, expresses a Congressional delegation of power "to adjust the imports" by means of quantitative import controls only.

On its face, the action authorized is limited by the stated objective (*i.e.* "to adjust the imports") and the general statutory purpose relating to national security.[1] The phrase "to adjust the imports" by itself denotes direct control over the volume of imports in question. This choice of words was entirely appropriate in light of the fact—as detailed later in this Brief—that Congress was concerned with imports in excessive quantities when it first considered and enacted this provision in 1955. It follows, then, that Congress intended to create a remedy that operated directly on the volume of imports concerned.

The legislative history of this provision shows that Congress expected such action to be taken as would control the quantity of imports in a direct and precise way. In fact, section 7 of the Trade Agreements Extension Act of 1955[2] expressly provided that the ob-

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[1] Petitioners contend that *any* measure calculated to stabilize or diminish the flow of imports of a designated article constitutes an action "to adjust the imports" concerned and, therefore, falls within the statutory scope of authority. (Pet. Brief, p. 26). Presumably, this would include such Presidential actions as (1) requiring all imported oil to be shipped on higher-cost U. S. flag vessels; (2) denying the investment tax credit provided in 26 USC 38 to oil refiners who use more than [say] 10 percent imported oil in their refinery operations; or (3) rationing gasoline, heating oil and other oil products.

[2] 69 Stat. 162. Section 7 added subsection (b) to section 2 of the 1954 Act entitled "An Act to extend the authority of the President to enter into trade agreements under section 350 of the Tariff Act of 1930, as amended," 68 Stat. 360.

ject of the authorized action was "to adjust the imports of such article *to a level*" commensurate with the national security interest (emphasis added). The phrase "to a level" clearly illustrates that the adjustment action contemplated was one which would be conducive to, and would actually result in, restricting the volume of imports to a predetermined level. By their very nature, duties, fees, and similar exactions cannot operate in so precise a fashion.[3] For that reason, it seems highly unlikely that Congress intended anything other than to authorize the use of quantitative import controls to deal with a problem identified by Congress as the importation of certain articles in quantities exceeding a "safe" level from the standpoint of national security.

The Trade Agreements Extension Act of 1958, 72 Stat. 673, amended the national security provision by directing that the effect of excessive imports of an article on defense-oriented industries be considered in making a national security determination. In effect, this amendment broadened the concept of "national

[3] This principle is well known to the responsible legislative committees and to the Congress as a whole. In 1970, for example, the Senate Finance Committee noted: "No tariff can be so scientifically set as to reasonably regulate the level of imports in accordance with the needs of the national security." S. Rep. No. 91-1431, 91st Cong., 2d Sess. 251 (1970). See also Foreign Trade Policy, Compendium of Papers on United States Foreign Trade Policy collected by the staff of the Subcommittee on Foreign Trade Policy of the House Ways and Means Committee (1958) in which several trade authorities made the same point, as for example, "An embargo, or a quota, is a quantitative restriction on imports . . . . A tariff, on the other hand, is merely a tax on imports. *It may or may not restrict trade* . . . depending on the level of the tariff and many other factors (p. 109; emphasis added).

security" for purposes of the statute.[4] At the same time the phrase "to a level" was deleted from the statute. Since that deletion was not mentioned in the committee reports or floor debates, it must be concluded that the purpose of the deletion was purely editorial. It did not signal a departure from the notion of quantitative import restrictions inherent in that phrase. An intent to make such a substantive change would surely have been explained in the legislative history. Accordingly, silence on that point indicates that the 1958 amendment made no substantive change in the national security provision as to the permissible forms of action "to adjust the imports" of any article. That conclusion is further strengthened by language in the Senate Finance Committee's report whereby the amended version of the national security provision was

[4] A provision was added requiring consideration of a number of factors bearing on the economic health of pertinent domestic industries in making a national security determination. Referring to these required considerations, Congress included the phrase "under such circumstances" in subsection (b) of the national security provision. Petitioners contend that the addition of that phrase expanded the range of authorized actions the President could take to deal with the problem identified in the statute. (Pet. Brief, pp. 27-28). There is nothing in the legislative history to support such a conclusion. Certainly, it has no foundation in the statutory language itself. Instead, the legislative history supports Respondents' position on this point, since it repeatedly describes the national security provision, as amended, solely in terms indicating that Congress contemplated restrictions on the volume of imports. This can be seen in the examples cited in footnote 5, *infra*. In addition, the Senate Finance Committee described the amendment as requiring the President to "take into consideration the effect on the national security in the weakening of the general economy by *excessive imports* of competitive products." S. Rep. No. 1838, 85th Cong., 2d Sess. 2 (1958); emphasis added.

described exclusively in terms associated with quantitative import controls.[5]

Reference to the national security provision in the legislative history of the Trade Expansion Act of 1962, which amended that provision, is formulated in the same vein. Thus, in the Senate Finance Committee Report the national security provision is described in the pertinent part as follows:

> "The bill retains present provisions governing the authority of the President *to adjust the level of imports* when he finds they threaten to impair the national security." S. Rep. No. 2059, 87th Cong., 2d Sess. 9 (1962); emphasis added.[6]

In view of the foregoing, it appears plain beyond dispute that the concept underlying the national security provision contemplates (1) a determination as to

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[5] For example, the Senate Finance Committee in its report explained, "As was the purpose when the national security section was added in the 1955 extension of the Act, the amendments are designed to give the President unquestioned authority *to limit imports* which threaten to impair defense-essential industries." *Id.* at p. 7; emphasis added. The Committee also stated that under the bill imports of an article must be adjusted "unless the President finds that they are not entering *in such volume* as to threaten the national security." *Ibid.*; emphasis added. It should be noted that the Congress also expanded the class of articles to which import restrictions could apply to "derivatives" of the named article. That amendment was explained in the Senate Finance Committee's report as follows:

> "The need for such additional language is obvious, for *a limitation of the materials alone* would serve only to spur the importation of the finished or semi-finished products which are, in the final analysis, the very items most essential to the defense of the country." *Id.* at p. 12; emphasis added.

[6] Almost identical language is found in H. Rep. No. 1818, 87th Cong., 2d Sess. 3 (1962).

the level of imports of an article that can be permitted consistent with the national security, and (2) action to restrict the volume of imports to that level. That concept necessarily implies the use of direct controls only, inasmuch as import duties or fees are inherently inexact in their influence on the volume of imports, and therefore, are fundamentally unsuited for the task of limiting the volume of imports to a specific level.[7] It is widely acknowledged among international trade experts that an import duty or fee does not exert a direct influence on the volume of imports.[8]

B. THE LEGISLATIVE HISTORY OF SECTION 232(b) DEMONSTRATES THAT THE ONLY AUTHORITY TO BE DELEGATED BY CONGRESS WAS THE AUTHORITY TO IMPOSE DIRECT OR QUANTITATIVE CONTROLS ON IMPORTS TO CORRECT A THREATENED IMPAIRMENT OF THE NATIONAL SECURITY.

The preceding references to the legislative history of section 232(b) relate to the statutory terminology and structure which, in turn, shed light on the probable legislative intent underlying that provision. More importantly, the legislative history shows that Congress

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[7] In a paper, entitled "The Use of Quotas for the Regulation of Imports", Professor Gottfried Haberler, Harvard University, noted, "Tariff protection leaves the quantity of imports variable." Reprinted in Foreign Trade Policy Compendium, *supra*, note 3, at p. 640.

[8] "Trade controls can be classified into two major categories: those trade controls that directly influence prices, such as taxes and subsidies, and those that directly influence quantities, such as quotas . . . ." Chacholiades, M., *The Pure Theory of International Trade* (Chicago 1973) at 395. It is clear from the language of the statute alone that the types of action authorized were such as would directly influence the quantity of imports, rather than their price. Of course, in the extreme situation, a duty or fee can have a prohibitive effect on the volume of imports. It can be reasonably assumed that a $100,000 per barrel fee on imported oil would have the effect of an absolute prohibition on oil imports.

had a very specific intent when it enacted the original provision in 1955, that that intent was to confer on the President the power to impose quantitative import controls only, and that such intent was not altered in subsequent amendments and re-enactments of that provision.

1. Trade Agreements Extension Act of 1955.

Section 232(b) had its genesis in section 7 of the Trade Agreements Extension Act of 1955. The substance of that provision has remained basically unchanged since then. Consequently, its legislative history is especially significant in determining the intended scope of authorized actions under section 232(b).

The problem of rising imports of oil in relation to the national security had been a matter of recurring public debate following World War II up until the enactment of section 7 in 1955. In October 1945 the Petroleum Industry War Council recommended a national security policy that "only such amounts of oil should be imported into this country as is absolutely necessary to augment our domestic production."[9] Later, in 1950, the Subcommittee on Oil Imports of the Select Committee on Small Business recommended that voluntary quotas on oil imports be established for the purpose, among others, of protecting national security capabilities.[10] In adopting that

[9] The Council was appointed by the Petroleum Administrator for War. The Council's public statement in which the quoted recommendation was made is reprinted in H. Rep. No. 2344, "Effects of Foreign Oil Imports on Independent Domestic Producers", 81st Cong., 2d Sess. 48 (1950).

[10] *Id.* at p. 147.

recommendation the Subcommittee rejected a proposal to impose an excise tax on oil imports on the ground that the objective of limiting the quantities of oil imports to set levels would not be achieved by means of a tariff. The Subcommittee found that there was no basis upon which to conclude that a tax in any amount "would limit the importation of any quantity of oil, a certain quantity of oil, or all oil imports."[11] In 1953 the House Ways and Means Committee favorably reported H.R. 5894, a bill to amend the Trade Agreements Extension Act of 1951, which, for national security reasons, included a statutory quota on imports of crude petroleum and residual oil.[12] The bill was recommitted by the House, evidently because of the controversial nature of some of the amendments. Instead, Congress opted for a simple one-year extension of the trade agreements authority.[13] When that trade agreements authority expired in the following year, an additional one-year extension was enacted, but with a limitation, sponsored by Senator Symington, prohibiting any tariff reduction which would threaten domestic production of any national defense requirement.[14]

Section 7 of the Trade Agreements Extension Act of 1955 was added by the Senate Finance Committee to

[11] *Id.* at p. 142.

[12] H. R. Rep. No. 777, 83rd Cong., 1st Sess. 7 (1953). The report stated:

> "During the hearings held on this subject the committee received convincing testimony that significant increases in these imports during recent years have been injurious to our domestic economy and detrimental to our national security."

[13] The Trade Agreements Extension Act of 1953, 67 Stat. 472.

[14] 68 Stat. 360.

a House-passed bill amid renewed expressions of concern about the quantity of foreign oil entering the United States and its effect on the national security. The initial approach to the oil problem was to restrict oil imports by statute to a fixed percentage of domestic production. An amendment to that effect was offered by Senator Neely during the Senate Finance Committee's hearings.[15] This was followed by the introduction of other amendments to impose similar restrictions or increased duties on imports of fluorspar, lead and zinc.[16] The Committee was thus faced with the political dilemma of avoiding a flood of "pet" amendments designed to protect various domestic industries against import competition for other than national security reasons, or where the national security justification was less certain than in the case of oil. The Committee's decision to delegate *any* authority to the President, therefore, must be understood as a response to political circumstances perceived at that time, that is, the difficulty of winning support for a statutory quota for oil alone. Thus, during the Senate floor debates, Senator Millikin (ranking minority member of the Finance Committee) explained:

> "One of the great pressures on the committee was for the adoption of amendments relating to specific commodities. The pressures were the greater because in each case there was a volume of evidence indicating the importance of those amendments to

[15] The Neely amendment, introduced on March 2, 1955, provided that "the total quantity of crude petroleum and petroleum products . . . which may be imported into the United States in any calendar quarter of any year shall not exceed 10 per centum of the total domestic petroleum demand . . . for the corresponding quarter of the previous year".

[16] S. Rep. No. 232, 84th Cong., 1st Sess. 4 (1955).

> the livelihood and happiness of many people." (101 Cong. Rec. 5299)

To the same effect, Senator Barkley (a member of the Finance Committee) observed:

> "Many Senators felt impelled by local situations and their own obligations to support individual amendments called for reservations, exemptions, or quotas for particular products. However, the amendment approved by the committee was voted for by an overwhelming majority of the committee, in lieu of the other amendments." (101 Cong. Rec. 5298)

Although section 7 was not specific as to any individual commodity, Congress understood that the cardinal purpose of that provision was the establishment of a quota on imports of oil.[17] The explanation of the national security amendment contained in the Senate Finance Committee report demonstrates this overriding concern by its emphasis on the recommendations

[17] During the floor debates Senator Robinson characterized section 7 as "the foreign oil limitation amendment." 101 Cong. Rec. 4306. In the second session of the same Congress, Congressman Siler, testifying on the trade agreements program before the House Ways and Means Committee, recounted the purpose of section 7 as follows:

> "The President signed this bill [referring to the Trade Agreements Extension Act] on June 21, 1955, with the amendment providing a means to restrict excessive oil imports. The clear understanding of the Congress at the time was that oil imports would be held to their 1954 relationship to domestic production. . ." Hearings before a Subcommittee of the House Ways and Means Committee on Administration and Operation of Customs and Tariff Laws and the Trade Agreements Program, 84th Cong., 2nd Sess., Sept. 24-28, 1956, at p. 987.

of the President's Advisory Committee on Energy Supplies and Resources Policy that imports of crude and residual oils be limited (preferably on a voluntary, but government-monitored basis) to the proportion such imports bore to domestic production in 1954 in the interest of national security.[18]

The significance of the Senate Finance Committee's reliance on the recommendations of the President's Advisory Committee was brought out during the Senate floor debates on section 7. A colloquy between Senator Carlson (a member of the Senate Finance Committee) and Senator Daniel is particularly revealing on this point:

> Mr. DANIEL. As a member of the committee, is it the opinion of the Senator from Kansas [Senator Carlson] that a majority of the committee, which supported the amendment, intended that the necessary action be taken to keep imports from exceeding the 1954 ratio, which has been interpreted by the President's advisory committee as the ratio beyond which injury would be done to the national security?
>
> Mr. CARLSON. One reason why I say that is very definitely the opinion of the committee, or at least the intent of the committee, is the fact that the chairman of the Finance Committee included in the report of the committee a part of the Advisory Committee's report, which, after all, in my opinion, gives the intent of the Finance Committee." (101 Cong. Rec. 5390) [19]

[18] These recommendations were contained in a report of the President's Advisory Committee released by the White House on February 26, 1955. Extensive excerpts were printed in the Senate Finance Committee Report. S. Rep. No. 232, *supra*, note 16 at p. 4.

The political acceptability of the section 7 "substitute" was, of course, dependent upon Executive Branch assurance that the primary purpose of the amendment (*i.e.* the establishment of quantitative limitations on oil imports) would be effectuated administratively under that authority.[20] It appears that such assurance was, in fact, given.[21]

Despite this background, Petitioners claim that Congress intended to delegate tariff-making power to the President in addition to the power to impose quantitative import controls. The overwhelming weight and direction of the legislative history is to the contrary.

The most authoritative evidence of legislative intent, apart from the statutory language itself, is the Report of the Senate Finance Committee. (S. Rep. No. 232, 84th Cong., 1st Sess. (1955)). Its probative value

[19] Senator Carlson stated that his colloquy with Senator Daniel reflected his understanding of "the congressional intent, including the intent of the Finance Committee." (101 Cong. Rec. 5301)

[20] During the debate on the conference report, Senator Douglas explained the central purpose of section 7 as follows: "All of us know what is behind that clause. . . . It involves, first the question whether actual or relative embargoes shall be imposed upon residual oil from South America, in order to protect coal and some of the oil producers of the United States." (101 Cong. Rec. 8244)

[21] Senator Carlson explained that he supported section 7 because he had been "assured by those in the administration responsible for the administration of the trade-agreements program that if such amendment were adopted by the committee and by Congress action would immediately follow, and that imports of petroleum and its products would be definitely restricted." (101 Cong. Rec. 5389).

derives from the fact that it represents the views of the whole Committee (except for Senator Malone who opposed the trade agreements extension bill in its entirety) formally adopted after review of the written document, as distinguished from the generally extemporaneous (and, therefore, less reliable) remarks of individual Senators made during the floor debate. That Report makes no mention whatever of any tariff, duty or similar charge on imports of any national security item.

The record of the Senate floor debates, taken as a whole, further substantiates the court of appeals' decision and the position of Respondents in this case. Section 7 was discussed extensively and was almost uniformly referred to or described in terms denoting quantitative or direct restrictions on imports. For example: Senator Barkley explained that section 7 reflected the Finance Committee's view that "instead of undertaking to impose *quotas*" by statute, Congress should authorize the President to do so;[22] Senator Malone characterized this provision as authorizing the President to "arrange *quotas or safeguards;*"[23] Senator Daniel noted that the responsibility of the Office of Defense Mobilization under section 7 was to report to the President when imports of a particular commodity "might be at such a *ratio* that they would endanger the national security;"[24] Senator Monroney stated that section 7 conferred on the President the power "to impose *quotas*";[25] Senator Carlson explained that section 7 generalized certain specific com-

[22] 101 Cong. Rec. 5298; emphasis added.

[23] 101 Cong. Rec. 5311; emphasis added.

[24] 101 Cong. Rec. 5391; emphasis added.

[25] 101 Cong. Rec. 5539; emphasis added.

modity amendments which provided for "the limitation of oil imports and the limitation of other imports on a *percentage or quota basis*";[26] and Senator Douglas observed that section 7 gave the "President the power to put import *quotas* into effect" and expressed his expectation that "oil, coal, fluorspar, zinc and lead will have *quotas* imposed upon them."[27]

In response to questioning by Senator Saltonstall, Senator Byrd (Chairman of the Finance Committee) explained that section 7 "puts other commodities on the same basis as agricultural commodities" and concluded:

> "It simply leaves to the President the power in his discretion, to decide whether *to impose a quota or to reduce the imports.*" (101 Cong. Rec. 5297; emphasis added.)

Plainly, Senator Byrd believed that the President's section 7 authority did not extend beyond the imposition of direct or quantitative limitations on imports. This conclusion is reinforced by Senator Byrd's reference to agricultural commodities by which he impliedly drew a parallel between the President's authority under section 22 of the Agricultural Adjustment Act (7 USC 624) and under section 7. In the immediately preceding colloquy with Senator Thye, Senator Byrd described section 22 exclusively in terms of quantitative import controls, as follows:

> "Mr. BYRD. . . . The President upon investigation, can impose *quotas* on agricultural products under section 22 of the Agricultural Adjustment Act.
>
> * * *

[26] 101 Cong. Rec. 5389; emphasis added.

[27] 101 Cong. Rec. 5584; emphasis added.

> "Mr. BYRD. . . . The existing law now provides that on agricultural products, the President has a right to impose *quotas* after an investigation has been made." (101 Cong. Rec. 5296; emphasis added.)

It seems indisputable, then, that Senator Byrd believed the authority granted by section 22 of the Agricultural Adjustment Act was confined to quantitative or direct import controls, and that the authority conferred by section 7 was likewise so confined.[28]

To a large extent Petitioners' argument that Congress intended to delegate tariff-making powers to the President is based on statements made during the Senate floor debates. Only two of the statements cited by Petitioners make any mention whatever of import duties or similar monetary exactions. Pet. Brief, pp. 36-37. One of these was made by Senator Bennett in reply to Senator Barkley's question whether the domestic fluorspar industry could receive the same favorable treatment by the Office of Defense Mobilization (ODM) that had already been accorded the domestic lead and zinc industry. (101 Cong. Rec. 5587). The question was raised following Senator Bennett's detailed account of how the lead and zinc industry had benefitted from a variety of governmental actions, including stockpile buying and exploration subsidies,

[28] Petitioners correctly point out that section 22 of the Agricultural Adjustment Act at that time authorized the President to impose fees or quantitative limitations to ensure the integrity of agricultural support programs. Pet. Brief, pp. 38-39. Petitioners conclude from this that Senator Byrd must have thought section 7 empowered the President to impose fees. As shown in the text above, however, Senator Byrd was not aware that section 22 authorized the imposition of fees or, at least, that he only had quantitative limitations in mind.

even though the President had not acted to withdraw tariff concessions on lead and zinc in the wake of an affirmative escape clause determination by the Tariff Commission. (101 Cong. Rec. 5585-5587). Senator Bennett further indicated that these programs resulted in a greater benefit to the domestic industry than a tariff increase (*i.e.* restoration of a prior tariff cut) would have provided.[29] He suggested, however, that the President could still restore a prior tariff cut because "lead and zinc are officially in the hands of the ODM as a result of the escape clause provision and a reference from the President." (101 Cong. Rec. 5588). Against that background, it is obvious that Senator Bennett was referring to administrative authority under a number of different statutory provisions when he stated:

> "As I understand the bill, the ODM will have at their command the entire scope of tariffs, quotas, restrictions, stockpiling, and any other variation of these programs in order to protect a particular industry, and to meet its particular needs." *Ibid.*

Petitioners' contention that Senator Bennett was describing section 7 alone is patently wrong, and therefore, the statement does not support the assertion that section 7 granted tariff-making authority to the President.

The other floor statement relied on by Petitioners was made by Senator Millikin (ranking minority mem-

[29] Senator Bennett also stated that in view of the administrative actions taken to protect the domestic lead and zinc industry, he had been willing to withdraw his amendment which would have provided for an excise tax on lead and zinc imports. 101 Cong. Rec. 5587. The adoption of section 7 by the Senate Finance Committee, of course, had the same effect as withdrawal.

ber of the Finance Committee) in which he indicated that the President "may use tariffs, quotas, import taxes or other methods of import restriction" pursuant to section 7 (101 Cong. Rec. 5299). The court of appeals gave little weight to this, apparently because it thought it was made for a parochial purpose. (Pet. App. 17a). It is clear, in any event, that Senator Millikin's description, as interpreted by Petitioners, is fundamentally at odds with the substance of the floor discussion on the subject. Moreover, it is inconsistent with another statement he made later that day (May 2, 1955) concerning the scope of section 7. In response to a question by Senator Bennett, Senator Millikin indicated that the *remedies* available under section 7 were the same as those available under the escape clause provisions.[30] The President's authority under the escape clause provisions in force at that time, however, extended only to the imposition of quotas or the withdrawal of prior tariff concessions, as recommended by the Tariff Commission.[31] In short, the only

[30] "MR. BENNETT. Is not the effect of the bill to provide two avenues by which an industry which might consider itself injured could receive a remedy: One through the Tariff Commission, and the other through the Office of Defense Mobilization?

"MR. MILLIKIN. I should say so; and I should further say that neither is exclusive. All the remedies available before these remedies were proposed [*i.e.* escape clause remedies] will be available afterward, particularly those which focus on defense industries." 101 Cong. Rec. 5302.

[31] Section 7, Trade Agreements Extension Act of 1951, 65 Stat. 72, as amended. A number of Presidential actions under the claimed authority of this provision were challenged in court and held invalid. In *Falcon Sales Co.* v. *United States*, 199 F. Supp. 97 (1961), for example, the U. S. Customs Court overturned the President's withdrawal of a prior tariff concession pursuant to an affirmative escape clause determination by the Tariff Commission, whereas the Tariff Commission had recommended the imposition of a quota as the appropriate remedy. The court held that the statute only permitted the President to accept or reject the Tariff Commission's recommendation. It did not give him authority to formulate a remedy different from that recommended. To the same effect, see *United States* v. *Schmidt Pritchard & Co., Mangano Cycles Co.*, 47 Ct. of Cust. & Pat. App. 152, *cert. denied*, 364 U.S. 919 (1960).

tariff action the President could take was to restore a tariff previously reduced pursuant to a trade agreement.

Senator Millikin's analogy between the escape clause provisions and section 7 provides a basis for reconciling his apparently contradictory statements. His earlier reference to tariffs and import taxes is more readily understandable if seen in the context of the so-called Symington amendment which had been enacted into law in 1954 and which was amended by section 7. That provision (now found in section 232(a) of the Trade Expansion Act of 1962, as amended) prohibited the President from reducing the tariff on any defense-essential article pursuant to his trade agreement authority. Senator Millikin may well have thought he was describing the requirements of *both* subsections (a) and (b) of the pertinent statute, rather than subsection (b) which was added by section 7. Under this analysis it would follow that Senator Millikin's statements related to tariff powers *only* in the context of Presidential action under the Symington amendment.[32]

[32] Additional credence is given this reading by the fact that Senator Millikin was speaking of the importance which he attached to assisting domestic industries "to supply the commodities needed for national defense *or* security." (101 Cong. Rec. 5299; emphasis added). Since by its terms subsection (b)—*i.e.* section 7—applied to "national security," while subsection (a) applied to "national defense," it would be reasonable to assume that he had both subsections in mind when he made the statements discussed above.

Section 7 was passed by the Senate without change as part of the trade agreements extension bill. A technical modification was made by the House-Senate Conference Committee[33] and subsequently approved by both Houses of Congress. Because the House acceded to the Senate's addition of section 7 to its trade bill, it must be assumed that that body's underlying intent was the same as the Senate's, that is, to authorize the President to restrict excessive imports of national security items by direct means.[34]

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[33] H.R. Conf. Rep. No. 745, 84th Cong., 1st Sess. 2, 6, 7 (1955).

[34] When Congressman Cooper (Chairman of the Ways and Means Committee) presented the conference report on the floor of the House, he made a point of noting that the concept of national security was broad and that strengthening the economies of our allies (by promoting trade with them) contributed to the national security of the United States. (101 Cong. Rec. 8161). Accordingly, the President was bound to weigh with care the adverse national security impact of refraining from reducing import duties (under the Symington amendment) or of imposing a quota under section 7 of the bill. Petitioners argue that Mr. Cooper's reference to "any modification of a duty on imports or a quota" means that he, at least, thought the Senate amendment granted tariff-making powers to the President. (Pet. Brief, p. 40). It is clear from the context, however, that Mr. Cooper was speaking about both the Symington amendment (now contained in section 232(a); 19 USC 1862(a)) and section 7 of the bill (section 232(b); 19 USC 1862(b)). The reference to a quota applied only to section 7. This reading is further strengthened by the fact that Congressman Mills, who along with Congressman Cooper had participated in the conference committee consideration of the bill, later stated that the conferees "intended that the injury be eliminated immediately in the interest of national defense through the use of a quota" and that the use of a duty was never intended. 116 Cong. Rec. 37848 (1970).

2. Trade Agreements Extension Act of 1958.

In 1958 Congress reenacted the national security provision with amendments. The changes related solely to matters of procedure and the criteria for invoking the authorized action.[35] No amendment was made, or proposed, to alter in any way the types of action that the President could employ "to adjust the imports" concerned to a level that would not threaten to impair the national security. Accordingly, the 1958 legislation cannot be cited as granting tariff power to the President where none previously existed.

3. Trade Expansion Act of 1962.

Congress reenacted the national security provision in section 232 of the Trade Expansion Act of 1962. Subsection (a) thereof incorporated the so-called Symington amendment (reservation of defense-related articles from negotiated tariff concessions), while subsections (b) through (d) incorporated—without substantive change—the corresponding subsections enacted in 1958.[36] Nothing in the 1962 legislation expanded the President's authority as to the types of actions he was permitted to take "to adjust the imports" of oil or any other article. No Executive Branch attempt had been made, prior to that time, to impose any kind of monetary charge on imports under the national security provision.

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[35] S. Rep. No. 1838, *supra* note 4, at pp. 11-12.

[36] "The bill retains present provisions governing the authority of the President to take action to adjust the level of imports when he finds they threaten to impair the national security." H.R. Rep. No. 1818, 87th Cong., 2d Sess. 3 (1962).

C. CONGRESS TOOK NO ACTION SUBSEQUENT TO THE TRADE EXPANSION ACT OF 1962 TO AUTHORIZE THE PRESIDENT TO IMPOSE DUTIES, FEES, OR OTHER EXACTIONS.

1. Proposed Trade Act of 1970.

In August 1970 the House Ways and Means Committee favorably reported a comprehensive trade bill written in committee. (H.R. 18970, 91st Cong., 2d Sess.) Section 104(a) of that bill would have amended section 232(b) by adding the proviso: "That any adjustment of imports shall not be accomplished by the imposition or increase of any duty, or of any fee or charge having the effect of a duty." The inclusion of that amendment was apparently prompted by the report of the Cabinet Task Force on Oil Import Controls, released earlier that year, which recommended the adoption of a variable tariff for oil imports beginning January 1, 1971, in lieu of the oil import quotas then in force.[37] In its report the Cabinet Task Force asserted that the President had such tariff power under section 232. (See Pet. Brief, pp. 5-6).

The trade bill was subsequently passed by the House and favorably reported by the Senate Finance Committee. The 91st Congress expired before the bill could be debated and voted on.[38]

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[37] *The Oil Import Question*, Cabinet Task Force on Oil Import Control (1970).

[38] Following the release of the Cabinet Task Force report on February 20, 1970, President Nixon ordered George A. Lincoln, Director of the Office of Energy Preparedness, to make recommendations on the oil import question with the advice of the Oil Policy Committee. In a letter dated August 13, 1970, Mr. Lincoln recommended to the President, with the concurrence of the Oil Policy Committee, that further consideration of a tariff system be discontinued and that the then current quota system to be continued and improved. Hearings and Informal Proceedings before the Committee on Finance, United States Senate, 91st Congress, 2d Session, on Amendments 925 and 1009 to H.R. 17550, Amendments to Incorporate the Text of the Trade Act of 1970, pp. 279-292 (October 9 and 12, 1970). This recommendation was accepted by the President, thereby obviating the pressure for prompt Congressional reaction.

Petitioners indirectly assert that the section 232(b) amendment reflects an understanding by Congress that tariff power had previously been delegated to the President by section 232(b) and that, because that amendment did not pass, the President's purported tariff powers remained intact. (Pet. Brief, p. 47). The legislative history of that bill directly contradicts that claim and demonstrates that the purpose of the section 232(b) amendment was to *clarify* the scope of that section. This can be seen from the following statement in the House Ways and Means Committee Report:

> "The committee has reviewed the legislative history of section 232 of the Trade Expansion Act and its predecessor provisions in the trade agreements legislation, and concludes that the delegation of authority to the President to adjust imports should be limited to the use of quantitative limitations." H. R. Rep. No. 91-1435, 91st Cong., 2d Sess. 23 (1970).[39]

Because the Committee's conclusion was based on its review of the legislative history, it seems obvious that the Committee was expressing its view that no tariff powers had ever been delegated to the President under section 232 or its predecessors.

When this provision was debated on the House floor, Congressman Mills, Chairman of the Ways and Means Committee, provided the following insight into the legis-

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[39] Identical language is found in the Senate Finance Committee's report. S. Rep. No. 91-1431, 91st Cong., 2d Sess. 251 (1970).

lative intent underlying the 1955 and 1958 versions of section 232(b):

> "I had something to do with the drafting of the national security provision back in the 1950's. The late Senator Kerr and I worked on it in conference with other Members. Mr. BYRNES was also a Member. You remember we did it in the conference. The House adopted it, and the Senate adopted the provision, too. What is here in law now we worked out in that conference. *We never intended any such use of tariff duty adjustments.* Whenever an industry essential to national defense was being impaired by imports *we intended that the injury be eliminated immediately in the interest of national defense through the use of a quota,* which would do it." (116 Cong. Rec. 37848; emphasis added.)

2. Trade Act of 1974.

The Trade Act of 1974, 88 Stat. 1978, amended section 232(b). These amendments were purely procedural. Consequently, there is nothing in the Trade Act of 1974 which expanded the President's authority to permit him to impose a duty, fee, or similar charge on imports of any article for national security reasons. The legislative history of that Act contains no statement which would warrant in any way the conclusion suggested by Petitioners that Congress intended to approve the imposition of the import license fee under the putative authority of section 232(b). To the contrary, Congress intended to reserve judgment on that issue to a later date when it could take up the problem of oil imports and energy resources in a comprehensive manner. Thus, the House Ways and Means Committee in its report stated:

> "It is the intention of the Committee to return to this important problem of establishing a rational and equitable allocation of imported energy resources." H.R. Rep. No. 93-571, 93rd Cong., 1st Sess. 36 (1973).[40]

Petitioners contend that the failure of Congress to take affirmative legislation action to disapprove the import license fee system first established by President Nixon in April 1973 has the effect of ratifying the exercise of authority not previously conferred (Pet. Brief, p. 48). Apart from the foregoing evidence that demonstrates Congress did not intend to ratify such action, it is important to note that the Nixon import license fee system did not materially increase the monetary burden on imports of oil. This is so because Presidential Proclamation No. 4210 (38 Fed. Reg. 9645 (1973)) *suspended* the "regular" customs duties on oil imports and

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[40] In accordance with its declared intention, the House Ways and Means Committee turned its attention to the question of energy resources and oil imports after it had completed its work on the Trade Act of 1974. The result of the Committee's deliberations was H.R. 14462 (proposed Oil and Gas Energy Tax Act of 1974) which it reported to the House on May 4, 1974. H.R. Rep No. 93-1028, 93rd Cong., 2d Sess. (1974). The bill was never voted on by the House. The bill would have amended section 232 to authorize the President to impose duties, taxes, or fees on petroleum imports under detailed standards and procedures, including limitations on the rate of monetary exactions that could be charged. This illustrates that when Congress intends to delegate tariff powers, it does so in explicit language, under clearly circumscribed conditions and under precise limitations. Against that typical mode of drafting tariff power delegations, the fact that section 232(b) and its predecessors are silent on the subject of duties, fees or similar charges would seem to negate Petitioners' argument that Congress intended to confer tariff power on the President.

substituted license fees at commensurate rates.[41] Therefore, President Nixon's license fee program amounted to a change in form rather than substance. As a result, there was no pressing need or motivation for Congress to respond to it.

In any event the proposition advanced by Petitioners that so fundamental a power as the power to tax can be transferred from the Congress to the Executive Branch by implied Congressional ratification—which is to say by Congressional default in the face of Executive Branch usurpation—is fraught with the greatest danger to our system of government. We submit that any application of the so-called ratification doctrine of statutory construction, where the tax or tariff power is involved, must be narrowly confined to situations in which the evidence shows Congress, after due deliberation or other form of actual consideration, intended to follow a course of conduct tantamount to affirmative legislation. Such a conscious choice to delegate power by inaction is not present here. To the contrary, the evidence shows a prevailing Congressional disinclination to relinquish such broad power to the President.

3. Congressional Responses to President Ford's Import License Fee Program.

In his State of the Union Message of January 15, 1975, President Ford announced that he was requesting

[41] Item No. 475.10 (column 1) of the Tariff Schedules of the United States (19 USC 1202) provides for a duty of 0.25 cents per gallon on crude petroleum imports (testing 25 degrees A.P.I. or more). Since there are 42 gallons to the barrel, this duty rate is equivalent to 10.5 cents per barrel. Presidential Proclamation No. 4210 instituted a license fee on crude oil imports of 10.5 cents per barrel on crude oil in lieu of the 10.5 cents per barrel equivalent provided by the Tariff Schedules.

the Congress to act within 90 days on a comprehensive energy tax program which, among other things, would authorize him to impose "[e]xcise taxes and import fees totalling $2 per barrel on product imports and on all crude oil." [42] Although Congress did not so act, Presidential Proclamation 4341 was issued on January 23, 1975, imposing a supplemental license fee on oil imported on or after February 1, 1975, at the rate of $3 per barrel to be phased in over three successive stages in increments of $1.[43]

Exactly one week after the President issued Proclamation 4341, the House Ways and Means Committee reported H.R. 1767 (94th Cong., 1st Sess. (1975)), a bill which would have suspended all Presidential authority under section 232(b) for a 90-day period and would have nullified that Proclamation. By February 19, 1975, both houses of Congress had passed H.R. 1767, but the President vetoed it on March 4, 1975.

It is clear that Congress saw the President's action as a usurpation of its Constitutional powers and responsibilities.[44] Thus, the House Ways and Means Commit-

[42] Reprinted in Hearings before the House Ways and Means Committee on Petroleum; Public Debt Ceiling Increase; and Emergency Tax Proposals, 94th Cong., 1st Sess. 3, 8 (January 1975).

[43] The $1 per barrel supplemental fee was applicable to oil imports made between February 1 and May 30, 1975, inclusive (Pres. Procs. 4355, 4376, and 4377). The $2 per barrel fee was in effect thereafter through December 21, 1975 (Pres. Proc. 4412). The $3 per barrel fee was never actually imposed.

[44] During the House Ways and Means Committee hearings Congressman Vanik stated that he was "troubled" by what he believed to be "the use or misuse of the President's power under the national security clause." In his view there was "a serious constitutional question" because the import license fee was "an

tee regarded H.R. 1767 as "essentially a response, and a much needed response, to the precipitous action taken by the President on January 23" because such action "*anticipated* enactment of legislation" authorizing import fees. (H.R. Rep. No. 94-1, 94th Cong., 1st Sess. 3 (1975); emphasis added). The Committee expressed its "basic concern" as to "the effect the Proclamation has on the authority of the Congress," and concluded that "there is no doubt" that the President's exercise of tariff powers "*pre-empts* the choices that are otherwise available to the Congress" in exercising its Constitutional powers in the tax and tariff field. (*Ibid.* at 12; emphasis added). Elaborating on that fundamental point the Committee stated:

> "The existing license fee system and the import fee system proclaimed January 23 establishes a separate taxing mechanism, defining taxable units and categories of goods, determining equities among taxpayers based on assumed special circumstances, and assigning revenue collection responsibilities. The whole revenue and tariff system established by the President is outside the tariff and customs law and the Internal Revenue Code, and none of the criteria and guidelines for administering the system has been approved by the Congress."
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> * * *
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> "The long and continued use of such a broad authority as Section 232 in the exercise of basic legislative functions of raising revenues and regulating commerce erodes the authority of the Congress and

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intrusion on one of the few remaining powers of the Congress and that is the power to tax." Hearings, *supra* note 42 at p. 285. Similarly, Congressman Green characterized establishment of the fee system as "the arbitrary exercise of Presidential power." *Ibid.* at p. 303.

> prevents it from fully exercising its constitutional responsibilities." *Id.* at 17.[45]

We submit that the Congressional reaction to the import license fee system decreed by the President on January 23, 1975, dramatizes the tenuousness of Petitioners' suggestion that Congress ratified the import license fee system.[46]

D. CONGRESSIONAL DELEGATIONS OF TARIFF AUTHORITY HAVE BEEN CONSISTENTLY CIRCUMSPECT AND SPECIFIC: SINCE SECTION 232(b) IS DEVOID OF EXPLICIT OR COLORABLE LANGUAGE DELEGATING TARIFF AUTHORITY TO THE PRESIDENT, THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE IMPOSITION OF IMPORT FEES WAS UNAUTHORIZED.

In ascertaining the Congressional intent, the court of appeals in this case emphasized the fact that, historically, whenever Congress has intended to require or authorize the imposition of import duties or similar

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[45] In its report the Committee showed that it was cognizant of an impending suit to challenge the validity of the import license fee system in court, as follows:

> "There is certainly grave doubt, at least, that a Court would uphold a claim that the Congress attempted to delegate virtually unlimited power to impose fees, no matter what euphemism is selected to denominate them, as a means of restricting imports. In any event, however, we understand the scope of that delegation will soon be determined in a Court action." *Id.* at p. 15.

[46] This applies not only to the Ford program but also to the pre-existing Nixon program. In that connection the House Ways and Means Committee report on H.R. 1767 stated that the bill did not ". . . ratify any previous actions by any President made in reliance on the National Security provisions of the Trade Expansion Act to impose dollar fees on imports, no matter whether this was done with or without public hearings and no matter whether done by Proclamation or in any other way." *Ibid.*

charges as the means of dealing with a problem relating to the foreign commerce of the United States, it has—without exception as far as we are able to determine—done so in explicit or otherwise precise terms. (Pet. App. at 14a). The appellate court below regarded this background of *consistent particularity* in Congressional delegations of tariff powers to the Executive Branch as strongly militating against Petitioners' contention that Congress intended to delegate tariff powers under a "blanket" delegation of authority.[47] We fully agree with that view.

Section 232(b) follows in concept and structure a number of other statutory provisions designed to safeguard a particular national economic or other interest from being adversely affected by imports. The most prominent of these other provisions can be summarized as follows:

(a) 19 USC 160 et seq. (The Antidumping Act, 1921, as amended).

This Act requires the imposition of a special "dumping duty" on an imported article sold at less than its fair value where such "dumping" causes injury to a domestic industry. The additional duty is generally equal to the difference between the price at which the article is sold for consumption in the country of origin

[47] The United States Customs Court in *Schmidt Pritchard & Co. v. United States*, 167 F.Supp. 272 (1958), also regarded the pattern of consistent Congressional particularity in tariff and trade legislation as a persuasive guide to legislative intent. Thus, the court declared: "It is of historic significance and importance that when Congress has intended to endow the Chief Executive with power and authority to exercise independent judgment designed to modify the tariff structure it has done so in clear and explicit terms." (At p. 279). *Aff'd*, 47 Ct. Cl. of Cust. & Pat. App. 152; *cert. denied*, 374 U.S. 919 (1960).

and a lower price on export sales to the United States market. Responsibility for determining whether sales at less than fair value exist is vested in the Secretary of the Treasury. Responsibility for determining whether the injury test is met is vested in the U.S. International Trade Commission.

(b) 19 USC 1303 (Countervailing duties).

This provision requires the Secretary of the Treasury to impose a special "countervailing duty" on imported articles where a "bounty or grant" is paid or bestowed in the foreign country of origin with respect to the manufacture or exportation of such articles. The additional duty must be equal to the amount of such "bounty or grant" as determined by the Secretary.

(c) 19 USC 1337 (Unfair practices in the import trade).

This provision declares unlawful unfair practices engaged in by United States importers and foreign exporters which tend to cause substantial injury to a domestic industry or tend to restrain or monopolize trade and commerce in the United States. The U.S. International Trade Commission is charged with the responsibility of making the appropriate factual determination. The Commission is empowered to order the total exclusion of the articles concerned from entry into the United States as long as the offending trade practices continue or, in lieu of such exclusion, to issue "cease and desist" orders. Under prescribed procedures, the President is permitted to negate the Commission's decision "for policy reasons". No other type of corrective action such as the assessment of an additional duty or similar charge) is provided for in the statute.

(d) 19 USC 2251 et seq. (Import relief or "escape clause" provisions).

These provisions require the U.S. International Trade Commission to determine, upon proper application, whether "an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof," to the competing domestic industry. If the Commission makes an affirmative determination, the President is required to provide import relief unless he determines such relief is contrary to "the national economic interest." The President is empowered to provide relief by any of four specified methods, or any combination thereof. He may increase the rate of duty on the imported article up to 50 percent *ad valorem* above the rate existing at that time. He may proclaim a tariff rate quota. He may modify or impose a quantitative restriction on the importation of such articles (but not to a level less than the quantity or value of that article imported during the most recent representative period). He may negotiate orderly marketing agreements with foreign supplying countries to limit their exports to the United States. Generally, the forms of relief may not remain in effect for a period exceeding five years.

(e) Section 22 of the Agricultural Adjustment Act of 1933, as amended (7 USC 624).

This provision requires or authorizes the President to impose "such fees not in excess of 50 per centum ad valorem or such quantitative limitations" on articles which he determines are being imported "under such conditions and in such quantities" as to render ineffective, or materially interfere with, certain agricultural price support programs, or similar programs designed to protect American agricultural interests.

(f) 50 USC App. 5(b) (Trading With the Enemy Act).

During time of war or other period of declared national emergency, the President is authorized by this provision to regulate imports "by means of instructions, licenses, or otherwise".[48]

(g) 19 USC 1336 (Flexible tariff).

This provision authorizes the President to increase by a maximum of 50 percent the statutory duty rates on any imported article as to which the Tariff Commission (renamed the International Trade Commission in 1975) has found the statutory duty rates fail to equal-

[48] This provision was claimed as authority for the 10 percent import surcharge instituted by President Nixon in August 1971. In *Yoshida International, Inc.* v. *United States*, 378 F. Supp. 1155 (1974), the United States Customs Court held the surcharge invalid on the basis that the words "instructions, licenses, or otherwise" define "the nature and mode of the regulatory authorization intended to be delegated to the President," that such delegation was accordingly restrictive in scope and precluded construing the statute as conferring power to regulate foreign commerce by means of supplemental import duties. The United States Court of Customs and Patent Appeals reversed on the grounds that the words "or otherwise" after the phrase "by means of instructions, licenses," should be read expansively in view of the national emergency context of the legislation to mean "by means of any other regulatory device". *United States* v. *Yoshida International, Inc.*, 526 F.2d 560 (1975). In our view, the Appellate Court in *Yoshida* was in error, because the legislative history of the operative provision showed that Congress intended the President to use direct means of control, because by the very nature of war or other national emergency Congress would logically select and authorize the use of direct import controls rather than such indirect controls as duties, and because the application of the *ejusdem generis* doctrine of statutory construction to the phrase "by means of instructions, licenses, or otherwise" would naturally lead to the conclusion that the meaning of the words "or otherwise" is to be taken from the character of the specifically named forms of action preceding it (*i.e.* direct controls).

ize the differences in the cost of production between that article and the equivalent article. This provision does not apply to any article the duty on which has been reduced pursuant to a trade agreement.

The foregoing provisions have a number of important characteristics in common. Each states, with a high degree of specificity, the action or range of actions authorized to be taken under the conditions described. Whenever the imposition of a duty or fee is authorized, it is done so explicitly and made subject to a prescribed numerical limitation, or a limitation precisely determinable in accordance with a statutory formula (*e.g.*, a special dumping duty must be equal to the exact difference between the fair value of imported merchandise and its import sales price; a special countervailing duty must be equal to the exact amount of "bounty or grant" found to exist).[49]

These provisions demonstrate continuous Congressional awareness of its prerogatives, powers, and obligations under the Constitution with respect to laying

[49] An exception to this otherwise uniform approach with respect to limitations on the rate or amount of duty authorized to be imposed can be found in 19 USC 2411. That provision authorizes the President to "impose duties or other import restrictions" on the products of any foreign country which he determines engages in certain condemned practices, including the maintenance of "tariff or other import restrictions," which discriminate against, or unreasonably burden or restrict, United States commerce. The purpose of any action authorized is "to obtain the elimination of" the foreign restrictions or other objectionable practices. In other words, the imposition of a tariff is to be used as leverage to secure removal of the foreign practice. Although no limit is set on the magnitude of the tariff the President can impose, the statute nevertheless makes it clear that the President is authorized to impose a tariff as a means of implementing the legislative purpose.

and collecting taxes, duties, imposts and excises and regulating commerce with foreign nations. Under such circumstances there is no real basis to believe that, absent express statutory language or clear-cut evidence in the legislative history to that effect, Congress intended section 232(b) as a delegation of its Constitutional power to levy import duties or fees, whether for the purpose of raising revenue or for the purpose of regulating foreign commerce. Since the statute does not expressly, or by necessary implication, so provide, and since the legislative history does not demonstrate such an intent, the conclusion seems inescapable that Congress did not intend to give tariff-making powers to the President when it enacted section 232(b).

II

IF SECTION 232(b) DELEGATES TO THE PRESIDENT THE POWER TO DEVISE ANY ACTION HE CHOOSES, IT MUST BE DECLARED INVALID AS AN UNCONSTITUTIONAL ABANDONMENT OF LEGISLATIVE POWER.

Petitioners argue that section 232(b) does not limit the kind of action the President may take under that provision so long as he thinks it would serve to carry out the broad statutory purpose. (Pet. Brief, p. 26). The essence of Petitioners' position is that Congress intended to confer on the President the discretion *to prescribe the form or forms of action to be taken.* We submit that the prescription of remedies or forms of action is a fundamental legislative function which cannot be delegated without contravening the separation of powers principle inherent in the United States Constitution. As stated by the Supreme Court in *Field* v. *Clark,* 143 U.S. 649 (1892):

> "That Congress cannot delegate legislative power to the President is a principle universally rec-

ognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." p. 692.

It has, of course, long been recognized that the delegation of some legislative powers is permissible under the Constitution on the basis of practical necessity. In that connection the Supreme Court, in *Hampton* v. *United States,* 276 U.S. 394 (1928) stated:

> "Congress may feel it is unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an executive . . . . " p. 406.

The catalogue of cases in which a statute has been challenged as an unconstitutional delegation of legislative power is extensive.[50] The central question in all those cases was whether the statute concerned provided sufficiently comprehensible standards to ensure that the will of Congress would be carried out.[51] As far as we have been able to determine, all those cases involved statutory provisions relating to the execution of the

[50] The United States Court of Customs and Patent Appeals' decision in *Star-Kist Foods, Inc.* v. *United States,* 275 F.2d 472 (1959), examined in some detail the Supreme Court precedents up to that time, especially as they pertained to the tariff and foreign trade laws of the United States.

[51] Statutory delegations have been upheld where, for example, the standard governing the action is "reasonably clear" (*Panama Refining Co.* v. *Ryan,* 293 U.S. 388, 434 (1935)); where the standard "sufficiently marks the field within which the Administrator is to act" (*Yakus* v. *United States,* 321 U.S. 414, 425 (1944)); and where the statute embodies an "intelligible principle" (*Hampton* v. *United States,* 276 U.S. 394, 409 (1928)).

law—*i.e.* when, if, and under what conditions, an action prescribed by Congress may be taken.[52]

The issue in the instant case is entirely different. The question raised is not whether the standards for taking any prescribed action are properly delineated, but *whether the power to prescribe the form of action itself can properly be delegated to the President.* We believe such a delegation cannot be proper under the Constitution, inasmuch as it would mean that the President would have discretion to determine what the law shall be. Judicial validation of that concept would create, we submit, an awesome precedent that would radically change the relationship between Congress and the Executive Branch. It would, in effect, justify the alien proposition that Congress may satisfy its Constitutional obligations by merely identifying problems and directing the Executive Branch to use whatever means it chooses to solve those problems.

III

THE IMPORT LICENSE FEE SYSTEM IS INVALID BECAUSE IT VIOLATES THE UNIFORMITY REQUIREMENT OF ARTICLE I, SECTION 8, CLAUSE 1 OF THE CONSTITUTION.

Article I, Section 8, Clause 1 of the Constitution provides:

> "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and

[52] In the *Star-Kist* case the court cited with approval the test advanced by Judge Ranney of the Supreme Court of Ohio in *Cincinnati, Wilmington, etc. R.R. Co.* v. *Commissioners of Clinton County,* 1 Ohio St. 77, 88, as follows: " 'The true distinction' . . . 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution . . .' ", *Star-Kist, supra,* note 49 at 477.

general Welfare of the United States; but *all Duties, Imposts and Excises shall be uniform throughout the United States.*" (Emphasis added.)

The import license fees, first imposed by Presidential Proclamation 4210 in 1973 and substantially revised by Presidential Proclamation 4341 in 1975, were not, and are not, uniform throughout the United States for purposes of Clause 1 and should, therefore, be declared invalid.

A. THE OIL IMPORT LICENSE FEES ARE DUTIES, IMPOSTS, OR EXCISES WITHIN THE MEANING OF ART. I, SEC. 8, CL. 1.

Under the oil import license fee system no petroleum or petroleum product may be licensed for importation unless the prescribed fees are paid in advance (or a bond posted to secure payment thereof).[53] Such fees, therefore, are charged for the privilege of importing a particular product. Since the fees are assessed at a per barrel rate, they constitute, in effect, import duties as generally understood.[54] Petitioners acknowledge that the import fee has the features of a customs duty "insofar as it is assessed against the importation of goods." (Pet. Brief, p. 19). Similarly, the United States Tariff Commission, in its report, entitled *World Oil Developments and U.S. Import Policies,* concluded that "the license fee has the incidences of a duty" and that the license fee program "is substantively a duty system."[55]

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[53] Sections 1(a) and 3(b)(1), Pres. Proc. 3279, as amended.

[54] Section 3(a)(1)(i), (ii), and—prior to amendment by Pres. Proc. 4412 in January 1976—(iii) of Pres. Proc. 3279, as amended.

[55] T. C. Publication 632 (Washington, D.C., October 1973) at p. 97. Cited by the court of appeals in the instant case (Pet. App., p. 26a, footnote 16).

In *Brown* v. *Maryland,* 12 Wheat. 419 (1827), the Supreme Court held, in an analogous situation, that a license fee enacted by the City of Baltimore on importers who sold imported goods at wholesale violated the Constitution's prohibition against any state-imposed imposts or duties on imports. Art. I, Sec. 10, Cl. 2. Writing for the Court, Chief Justice Marshall reasoned that "a tax on the occupation of an importer is . . . a tax on importation" and had the same effect as "a direct duty on the [imported] article itself." *Id.* at 444. There is no reason to doubt that the terms "imposts" and "duties" as used in Art. I, Sec. 10, Cl. 2 have the same meaning for purposes of the uniformity requirement in Art. I, Sec. 8, Cl. 1.

While we cannot say for sure whether the import license fees are duties or imposts (or possibly excises), we believe they qualify as "imposts" as that term is used in the Constitution.[56] In any case, it is clear that the fees fall into at least one of those categories. As a consequence, the uniformity requirement necessarily applies to such "fees."

B. THE OIL IMPORT LICENSE FEES VARY BY REGION AND ARE, THUS, NOT UNIFORM IN THE CONSTITUTIONAL SENSE.

It is well established that the Clause 1 uniformity requirement refers to geographic uniformity as distin-

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[56] The meaning of the Constitutional terms "duties" and "imposts" was given a detailed review by the Supreme Court in *Michelin Tire Corp.* v. *Wages,* No. 74-1396, — U.S. — (1976). There, the Court indicated that the term "impost" as used at the time of the Constitutional Convention was understood to encompass any charge in the nature of a customs duty with respect to the importation of any article of commerce.

guished from intrinsic uniformity.[57] The oil import license fees here in controversy are not geographically uniform throughout the United States. This is so because the fees vary according to the regional import quota allocations applicable under the preexisting Mandatory Oil Import Quota Program established by Proclamation 3279 in 1959. Since the oil import quota program discriminated by region, fees which are dependent upon such allocations are, likewise, discriminatory on the basis of region.

For purposes of administering the Mandatory Oil Import Quota Program established in 1959 by Proclamation 3279, the United States was divided into two basic geographic regions: Districts I-IV (essentially the states east of the Rocky Mountains)[58] and District V (the western states).[59] These regional designations have remained in effect and are integral to the application of the oil import license fee system here in dispute. Under the license fee system oil imports up to a prescribed level, which is different for each of the

[57] *Fernandez* v. *Weiner*, 326 U.S. 340 (1945). It seems self-evident that whether a duty, impost or excise is imposed for purposes of raising revenue, or for purposes of regulating the foreign commerce of the United States, is immaterial insofar as this uniformity requirement is concerned. It should be noted, however, that when instituted, Pres. Proc. 4341 was expected to generate annual revenue of $4.8 billion, an amount exceeding total import tariff revenues for 1974. See Pet. App. 14a, n. 13.

[58] "[T]he District of Columbia and all of the states of the United States except those states within District V." Section 11(d) of Pres. Proc. 3279, as amended.

[59] "[T]he states of Arizona, Nevada, California, Oregon, Washington, Alaska, and Hawaii." Section 11(e) of Pres. Proc. 3279, as amended.

two main regions, are exempt from the "base" fee.[60] These "fee-exempt" allotments are derived from the regional quotas established under the Mandatory Oil Import Quota Program which the import license fee system replaced. By 1980 the "fee-exempt" allotments are to be reduced to zero in successive annual stages.

Under the import license fee system, in effect through most of 1975, importers of higher grade crude oil, for example, were subject to three different monetary exactions:

(1) a "regular" customs duty of 10.5 cents per barrel,[61]

(2) a "base fee" of 21 cents per barrel, and [62]

(3) a supplemental fee of $2 per barrel ($1 per barrel if imported between February 1 and May 30, 1975).[63]

The $2 supplemental fee was required with respect to every barrel of imported crude oil, whereas the base fee applied only to *some* of those barrels. In addition, the combined fee (base fee and supplemental fee) otherwise chargeable on any barrel of imported crude oil was reduced by the applicable amount of customs duty. Thus, the total exaction on each barrel of im-

[60] The exempt quantities are prescribed in sections 2 and 8 of Pres. Proc. 3279, as amended by Pres. Proc. 4210 (38 Fed. Reg. 9645). Section 3(a)(1)(ii) imposes the base fees on imports "over and above the levels of imports established in Section 2."

[61] Item 475.10 (column 1), Tariff Schedules of the United States, 19 U.S.C. 1202.

[62] Section 3(a)(1)(i), Pres. Proc. 3279, as amended.

[63] Section 3(a)(1)(iii), Pres. Proc. 3279, as amended.

ported higher grade crude oil was either $2.21[64] or $2.00[65] depending on whether the base fee exemptions applied. Since the base fee exemption was allocated on a purely regional basis, and since there was a substantial disparity in the amount of those allocations (as between Districts I-IV on the one hand, and District V on the other), it necessarily follows that the import fees were discriminatory on a geographical basis in violation of the uniformity requirement of Article I, Section 8, Clause 1 of the Constitution.

To illustrate the non-uniform operation of the fee/duty system, consider that for the month of September 1975, the fee-exempt crude oil allocation was 1,593,600 barrels per day for Districts I-IV and 536,000 barrels for District V.[66] During the same month the average crude oil imports amounted to 3,262,533 barrels per day for Districts I-IV, and 684,133 barrels per day for District V.[67] This means that the first 536,000 daily

[64] 10.5 cents regular duty, plus 21 cents base fee, plus $2.00 supplemental fee, less credit for duty of 10.5 cents, totalling $2.21.

[65] 10.5 cents regular duty, plus $2.00 supplemental fee, less credit for duty of 10.5 cents, totalling $2.00.

[66] Districts I-IV were permitted to import 1,992,000 "average barrels per day per year" from non-Canadian, non-Mexican sources (section 2(a)(1) of Pres. Proc. 3279, as amended), reduced by 20 percent (section 8 of Pres. Proc. 3279, as amended), or 1,593,600 barrels. Separate fee-exempt allocations for imports from Canada and Mexico were prescribed by section 2 of the Proclamation, but these provisions do not affect the validity of the basic argument made herein. The Canadian and Mexican allocations and imports have been excluded only in order to simplify the computations and general discussion.

[67] Actual daily imports derived by subtracting from total actual monthly imports all imports from Canada and Mexico and dividing resultant figures by the number of days in the month. Actual

barrels of crude oil imported into the western states and the first 536,000 daily barrels imported into the eastern states were exempt from a base fee. The next 148,133 daily barrels imported into the western states, however, were subject to the maximum charge of $2.21 per barrel, while only $2.00 per barrel was paid with respect to the same amount of daily barrels imported into the eastern or Gulf coast states.

The rate differential described above, excluding the reduction for regular duties,[68] can be seen from the following table:

RATES ON CRUDE OIL IMPORTS—SEPTEMBER 1975
(Without Reduction for Customs Duty)

Districts	First 536,000 Barrels/day	Barrels in Excess of 536,000 Barrels/Day	Barrels in Excess of 1,593,600 Barrels/Day
I-IV	$2.00	*$2.00**	$2.21
V	$2.00	*$2.21*	$2.21

* Up to 1,539,600 barrels/day.

This constitutional defect in the import license fee system was raised by the United States Tariff Commission in its October 1973 report on oil import policy to the Senate Finance Committee. In describing the import license fee system established by President Nixon earlier that year, the Commission observed:

> "What was permissible under a quota system may be unacceptable under a duty program. Given a

monthly imports taken from import statistics published in the "Crude Petroleum, Petroleum Products, and Natural Gas Liquids" mineral industry survey for September 1975 prepared January 29, 1976, by the Division of Fuels Data, Bureau of Mines, U.S. Department of the Interior, pages 16 and 17, Table 14.

[68] Since the customs duty is collected in all events, but also is credited against applicable duties, the fee rates shown in the table also equal the total exactions per barrel for the same quantities of imports.

duty system existing now and not held in abeyance until 1980 when the fee-free aspects are phased out, Proclamation 4210 must satisfy the uniformity requirement for duties from the date of its promulgation. The continuing variation in allocations resembles, under the duty program, an exemption on an unequal basis from the duty, suggesting non-uniformity in the application of the duty. An importer on the east coast will be paying a license fee on the first barrel of oil after his free allocation has been expended, while an identical importer on the west coast may be paying a zero duty on the equivalent barrel because his allocation was larger (the result of a larger total pool in his district to share in). *This violates the requirement of geographic uniformity, because the result is different duties in two ports on the same item, the item being the xth barrel of oil.* The license-fee system in its final form (1980) avoids this difficulty. The question of the propriety of fee-free allocations remains, however, until such system is completely phased out." (Emphasis added).[69]

CONCLUSION

For the reasons set forth above the judgments of the court of appeals should be sustained.

Respectfully submitted.

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[69] *Supra*, note 55 at pp. 98-99.

Certificate of Service

I hereby certify that three copies of the foregoing Brief of *Amicus Curiae* were, this 17th day of March 1976, mailed, first class postage prepaid, to the following counsel of record:

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